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Aid or Obstruction? Government Regulation of Cable Television Meets the First Amendment—Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir.), affirmed in part and remanded, 54 U.S.L.W. 4542 (U.S. June 3, 1986) (No. 85-390)

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AID OR OBSTRUCTION? GOVERNMENT REGULATION OF CABLE TELEVISION MEETS THE FIRST AMENDMENT—*Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.), *affirmed in part and remanded*, 54 U.S.L.W. 4542 (U.S. June 3, 1986) (No. 85-390).

In *Preferred Communications, Inc. v. City of Los Angeles*,¹ the Ninth Circuit became the first circuit to limit, on first amendment grounds, a city's ability to deny a cable television company access to a local market.² The Supreme Court's resolution of issues raised in *Preferred Communications* will have far-reaching impact, particularly with regard to the government's power to minimize the impact of cable television systems on government property and eliminate economic waste through duplicative service.

This Note will examine the Ninth Circuit's use of the public forum doctrine in determining Los Angeles' power to restrict the use of its utility poles by potential cable operators. The Note will analyze the court's evaluation of the first amendment rights of cable operators as well as the court's evaluation of the importance of several government justifications for regulating the number of cable systems it will allow to operate within a geographic area. The Note concludes that the result reached by the Ninth Circuit is correct, but that due to limitations imposed by the procedural posture of the case, the court's holding provides limited guidance for future courts and litigants. The Note also concludes that the Supreme Court should reach the same result as the Ninth Circuit and should take the opportunity to provide guidance to courts on the matters of both the first amendment interests of cable operators and regulatory interests of government. Finally, the Note recommends that Congress amend the leased channel access provisions of the Cable Communications Policy Act of 1984³ to allow local governments flexibility in granting exclusive cable franchises consistent with first amendment values.

1. 754 F.2d 1396 (9th Cir.), *affirmed in part and remanded*, 54 U.S.L.W. 4542 (U.S. June 3, 1986) (No. 85-390).

2. Prior to *Preferred Communications*, several courts had considered a city's interest in restricting the use of its property (e.g., utility poles and public rights of way) by cable operators. See *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder (Boulder II)*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Century Federal, Inc. v. City of Palo Alto*, 579 F. Supp. 1553 (N.D.Cal. 1984); *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982); see also *Berkshire Cablevision, Inc. v. Burke*, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985). Subsequent to the *Preferred Communications* decision, two other courts have faced the question of the government's power to deny cable television operators access to its citizens. See *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891 (W.D. Mo. 1985).

3. Pub. L. No. 98-549, 98 Stat. 2779 (to be codified at 47 U.S.C. §§ 521-559 and scattered sections). See generally *infra* text accompanying notes 27-42.

I. THE HISTORY OF CABLE TELEVISION REGULATION

The origins of cable television can be traced to the activities of several entrepreneurs in Pennsylvania during the late 1940's.⁴ Early cable systems were developed to make broadcast television signals available to rural areas and small communities which were denied quality reception due to their distance from broadcasters or the interference of geographic barriers. These early systems captured broadcast signals using a large antenna and transmitted the signal to subscribers via a communications cable. For this reason the service was referred to as Community Antenna Television, or CATV. A decade after the first system began operating, 560 cable systems were serving 550,000 subscribers.⁵ This dramatic increase accompanied the growth of broadcast television during the same period. The broadcast television industry grew from 108 stations serving 15 million viewers in 1952 to 510 stations serving 44 million viewers in 1959.⁶ As of 1984, cable systems served approximately 35 million subscribers, many of whom live in areas also served by broadcasters.⁷

Rapid technological developments, particularly developments in the use of communications satellites to distribute programming nationally, have contributed greatly to cable's success. Modern cable systems can handle over 100 television channels.⁸ The bulk of communications transmitted via cable today consists of video entertainment and news programming.

In addition to video programming, modern cable can also provide services unavailable to the broadcast television viewer. Cable's physical link to the home allows the subscriber to transmit communication back to the operator. The operator can therefore provide services such as burglar and fire alarm monitoring, medical monitoring, and electronic mail delivery services.⁹ This link also enables the operator to monitor what shows

4. The development of cable television has been attributed to John Walson, Sr. of Mahanoy City, Pennsylvania, who, in 1948, constructed an antenna on a nearby mountain in order to receive broadcast signals which were blocked by mountains. M. HAMBURG, *ALL ABOUT CABLE* § 1.02, at 1-6 (rev. ed. 1985).

For a more complete discussion of the history of cable television development and regulation, see *id.* See also Besen & Crandall, *The Deregulation of Cable Television*, 44 *LAW & CONTEMP. PROBS.* 77 (1981); Stanzler, *Cable Television Monopoly and the First Amendment*, 4 *CARDOZO L. REV.* 199, 205-10 (1983).

5. TELEVISION DIGEST, 39 TELEVISION FACTBOOK 72(a) (1970).

6. *Id.* at 79(a).

7. M. HAMBURG, *supra* note 4, § 1, at 4-2. This number represents about 41% of the country's 84 million television homes. *Id.*

8. See, e.g., *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1439 (D.C. Cir. 1985).

9. Noncommunication services might include, for example:

security monitoring (burglar, fire and police alarms); remote computer terminals providing access to a vast array of computer programs and data bases; medical monitoring; meter reading; energy management; transactional services, e.g., home shopping and banking; polling; new highway

subscribers watch, thereby allowing the operator to bill subscribers on a per show basis for programming.¹⁰

A. *FCC Regulation: A Fading Consideration*

Regulation of cable television by the Federal Communications Commission (FCC)¹¹ has progressed through several stages. After an initial period of "benign neglect" by the agency toward the development of cable,¹² in the late 1950's the FCC became more active in regulating the new industry. Initially, the FCC found insufficient evidence that the importation of television broadcast signals via cable threatened the economic viability of local broadcasters.¹³ The FCC reevaluated the evidence in 1962 and determined that cable television might indeed pose an economic threat to local broadcasters. This determination was based on the fear that cable subscribers with access to distant broadcast signals might not continue to view advertiser-supported local broadcasts, and that the resulting loss of advertiser revenues would drive the local stations out of business.¹⁴ The FCC concluded that the improved service which cable promised to many did not justify the natural economic elimination of local broadcasters.¹⁵

traffic management; accessing selected libraries of films or video tapes; text retrieval; [and] electronic mail delivery.

Miller & Beals, *Regulating Cable Television*, 57 WASH. L. REV. 85, 88 n.13 (1981), reprinted in 3 COMMENT 607, 610 n.13 (1981).

10. This service is known as "pay cable."

11. The Federal Communications Commission was established by the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-757 (1982)), in order "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." *Id.* § 151.

12. Besen & Crandall, *supra* note 4, at 81.

13. See Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403, 415, 421-22 (1959). See also *Carroll Broadcasting v. FCC*, 258 F.2d 440 (D.C. Cir. 1958) (FCC claimed that it lacked authority to evaluate alleged detrimental impact upon existing radio broadcast licensee and public interest which might result from grant of second license to broadcast in area).

14. The preservation of local broadcasting is a Congressional objective which has been recognized by the Supreme Court. In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Court observed that the FCC's Congressional mandate to provide a "fair, efficient, and equitable distribution" of radio and television service among the "several States and communities," *id.* at 173-74 (quoting 47 U.S.C. § 307(b)), required that the FCC create "a system of local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'" *Id.* at 174 (footnote omitted) (quoting H.R. REP. NO. 1559, 87th Cong., 2d Sess. 3 (1962)) (brackets in original). This objective, which is commonly referred to as "localism," has not been challenged in federal court, and continues to receive support. See *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454 n.43 (D.C. Cir. 1985).

15. *Carter Mountain Transmission Corp. v. FCC*, 32 F.C.C. 459, 464-65, *aff'd*, 321 F.2d 359 (D.C. Cir. 1962), *cert. denied*, 375 U.S. 951 (1963).

To preserve local stations, the FCC promulgated the "must carry" rules requiring cable systems to carry local broadcasts.¹⁶ The FCC also prohibited cable systems from importing distant signals which duplicated local programming.¹⁷ The Supreme Court upheld these regulations in *United States v. Southwestern Cable Co.*¹⁸ as "reasonably ancillary" to the FCC's purpose. In 1969 the FCC ordered cable systems serving more than 3500 subscribers to originate their own programming.¹⁹ A narrowly divided court upheld these regulations in *United States v. Midwest Video Corp. (Midwest Video I)*.²⁰

Subsequent attempts by the FCC to expand cable television regulation were less successful. In 1977 the District of Columbia Court of Appeals struck down as overbroad FCC regulations prohibiting the showing on pay cable systems²¹ of certain sports events and other entertainment that might otherwise be shown on broadcast television.²² The FCC had argued that pay cable subscribers might buy away programming from broadcasters, thereby denying the majority of viewers access to the programming.²³ The FCC was again disappointed in *FCC v. Midwest Video Corp. (Midwest Video II)*,²⁴ where the Supreme Court struck down FCC rules requiring cable systems to provide channels for use by the general public.

More recently, the FCC has actually lost ground in the regulation of cable television. In July 1985 the District of Columbia Court of Appeals struck down the FCC must carry rules upheld earlier on different grounds in *Southwestern Cable*.²⁵ The court held that the rules, as formulated by the FCC, violated the first amendment rights of cable operators.²⁶ If that

16. CATV, Second Report and Order in Docket No. 14,895, 2 F.C.C.2d 725, 798 (1966). For a discussion of the present content of these rules, see *Quincy Cable*, 768 F.2d at 1440 n.12.

17. CATV, Second Report and Order in Docket No. 14,895, 2 F.C.C.2d 725, 798 (1966) (importation of signals which duplicated local programming prohibited if the programming had been shown the day before or would be shown the same day or the day after).

18. 392 U.S. 157, 178 (1968). The Court did not consider the first amendment implications of its decision, having characterized the cable medium as a passive transmitter of signals rather than an originator of speech. *Id.* at 161-62. See also *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398-400 (1968). The "must carry" rules were recently struck down by the D.C. Circuit as violative of the first amendment. See *infra* notes 25-26.

19. CATV, First Report and Order in Docket No. 18,397, 20 F.C.C.2d 201 (1969).

20. 406 U.S. 649 (1972) (four-justice plurality opinion, Brennan, J., concurring in the result).

21. See *supra* text accompanying note 10.

22. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

23. *Home Box Office*, 567 F.2d at 21.

24. 440 U.S. 689 (1979).

25. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985). The D.C. Circuit found that the constitutionality of the must carry rules had never been addressed directly. *Id.* at 1443. See also *supra* note 18.

26. The D.C. Circuit found that the FCC had failed to adequately justify its regulations and that the regulations were not narrowly tailored to achieve the result sought. *Quincy Cable TV*, 768 F.2d at

court's conclusion stands, it may well mark the beginning of the end of FCC jurisdiction over cable television video programming services, particularly in light of recent legislation addressing cable television regulation.

B. *Cable Communications Policy Act*

In October 1984 Congress enacted the Cable Communications Policy Act of 1984 ("Cable Act" or "the Act").²⁷ The Cable Act amends Title VI of the Communications Act of 1934²⁸ in order to: (1) establish a national policy with respect to cable communications; (2) establish franchising procedures to encourage cable development responsive to local needs; (3) establish regulatory guidelines for federal, state, and local governments; (4) ensure that maximum diversity of programming is provided; (5) ensure that cable operators are not unfairly denied franchise renewals; and (6) promote competition and minimize the burden of regulation in the industry.²⁹

The Act authorizes a state or local government to grant one or more franchises to cable operators within its jurisdiction.³⁰ As a condition of the franchise grant, the franchising body may, at its own discretion, require the cable operator to provide channel capacity for public, educational, or government use.³¹ The Act also requires cable operators to provide

1462-63. In addition to holding that the must carry rules deprived the cable operator of the guaranteed freedom to select programming, the court held that the must carry rules might also operate to deny programmers a market for their programs if a significant number of local cable channels were used to carry broadcast signals. The court determined that this relationship afforded a programmer standing to challenge the constitutionality of the rules. *Id.* at 1445 & n.24.

27. Pub. L. No. 98-549, 98 Stat. 2779 (to be codified at 47 U.S.C. §§ 521-559 and scattered sections). The Act expands FCC jurisdiction over crossownership, pole attachments, technical standards, and equal employment opportunity, but limits FCC involvement in rate regulation and leased channel access. M. HAMBURG, *supra* note 4, § 2.02[3], at 2-10. *But see* Fogarty & Spielholz, *FCC Cable Jurisdiction: From Zero to Plenary in Twenty-Five Years*, 37 FED. COMM. L.J. 113, 127-29 (1985) (Cable Act leaves largely unresolved FCC's jurisdiction over non-video services).

28. 47 U.S.C. §§ 151-757 (1982). *See supra* note 11.

29. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 601, 98 Stat. 2779, 2780 (to be codified at 47 U.S.C. § 521).

30. *Id.* § 621, 98 Stat. at 2786 (to be codified at 47 U.S.C. § 541).

31. *Id.* § 611, 98 Stat. at 2782 (to be codified at 47 U.S.C. § 531).

This Note is concerned only with exclusive franchising and not with franchising in general. For a defense of the constitutionality of cable franchising provisions generally, see H.R. REP. NO. 934, 98th Cong., 2d Sess. 31-37 (1984) [hereinafter cited as HOUSE REPORT]; Stanzler, *supra* note 4, at 240-44; Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMMENT 1 (1981). *See also* Mininberg, *Circumstances Within Our Control: Promoting Freedom of Expression Through Cable Television*, 11 HASTINGS CONST. L.Q. 551 (1984); Comment, *Public Access to Cable Television*, 33 HASTINGS L.J. 1009 (1982). For an opposing view, see Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867 (1983); Comment, *Cable Franchising and the First Amendment: Does the Franchising Process Contravene First Amendment Rights?*, 36 FED. COMM. L.J. 317 (1984).

channels for lease by commercial programmers unaffiliated with the operator.³² This provision is intended to assure diversity of perspective.³³ The channel capacity of the system determines the number of mandatory leased access channels required.³⁴ The local franchising body may not increase or decrease this number.³⁵

In addition, the Cable Act forbids "cream skimming" by cable systems; that is, cable operators may not provide cable service to wealthier neighborhoods while neglecting lower income sections of town.³⁶ The Act forbids ownership of cable systems by local broadcasters and telephone companies,³⁷ but allows ownership by local governments as long as the local governments avoid editorial control of programming.³⁸

The Act limits the amount of franchising fees or excise taxes which the franchising body may collect,³⁹ and allows the franchising body to regulate rates charged to subscribers until December 30, 1986.⁴⁰ After that date, the franchising body can regulate subscriber rates only if no effective competition exists for the cable system according to guidelines to be established by the FCC.⁴¹ The Act also provides a framework for fair treatment of franchisees engaged in franchise renewal.⁴²

II. THE PREFERRED COMMUNICATIONS DECISION

The City of Los Angeles licensed the installation and operation of cable television systems through a franchise auction process.⁴³ Companies interested in installing and operating systems in a certain region of the city were

32. Pub. L. No. 98-549, § 612, 98 Stat. 2779, 2782-85 (to be codified at 47 U.S.C. § 532).

33. *Id.* § 612(a), 98 Stat. at 2782 (to be codified at 47 U.S.C. § 532(a)).

34. *Id.* § 612(b), 98 Stat. at 2782-83 (to be codified at 47 U.S.C. § 532(b)). *See infra* note 189.

35. Pub. L. No. 98-549, § 612(b)(1), (2), 98 Stat. 2779, 2782-83 (to be codified at 47 U.S.C. § 532(b)(1), (2)).

36. *Id.* § 621(a)(3), 98 Stat. at 2786 (to be codified at 47 U.S.C. § 541(a)(3)).

37. *Id.* § 613, 98 Stat. at 2785-86 (to be codified at 47 U.S.C. §§ 201, 533).

38. *Id.* § 613(e), 98 Stat. at 2785-86 (to be codified at 47 U.S.C. § 201(e)).

39. *Id.* § 622, 98 Stat. at 2787-88 (to be codified at 47 U.S.C. § 542).

40. Rate regulation is permitted until the end of the two-year period following the Act's effective date, *id.* at § 623(c), 98 Stat. at 2788-89 (to be codified at 47 U.S.C. § 543(c)), which was 60 days following the Act's enactment on October 30, 1984. *Id.* § 9(a), 98 Stat. at 2806 (to be codified at 47 U.S.C. § 521).

41. *Id.* § 623(b), 98 Stat. at 2788 (to be codified at 47 U.S.C. § 543(b)).

42. *Id.* § 626, 98 Stat. at 2791-93 (to be codified at 47 U.S.C. § 546). The Act also makes unauthorized use of cable services a crime, *id.* § 633, 98 Stat. at 2796-97 (to be codified at 47 U.S.C. § 553), and allows the franchising body to prohibit or otherwise control obscene programming. *Id.* § 624(d), 98 Stat. at 2790 (to be codified at 47 U.S.C. § 544(d)).

43. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1400 (9th Cir.), *affirmed in part and remanded*, 54 U.S.L.W. 4542 (U.S. June 3, 1986) (No. 85-390). The franchising process is authorized by CAL. GOV'T CODE § 53,066 (West Supp. 1985).

required to bid for the franchise. As a part of the bidding process, the company had to agree to certain conditions, including a condition that the operator provide public access channels,⁴⁴ and had to otherwise convince Los Angeles that superior service would be provided by the operator.⁴⁵ Preferred Communications, Inc. (PCI) was formed for the purpose of installing and operating a cable television system in the South Central District of Los Angeles.⁴⁶ PCI had not participated in Los Angeles' auction of the franchise for the South Central District and its application for a license to operate there was consequently denied.⁴⁷ PCI brought suit in federal court against the City of Los Angeles, alleging that Los Angeles' regulation of cable television had abridged PCI's first amendment rights.⁴⁸ The district court held that PCI had not stated a valid claim; the court ruled that as a matter of law Los Angeles' franchising process did not violate PCI's first amendment rights.⁴⁹

The Ninth Circuit Court of Appeals reversed the district court, ruling that Los Angeles' auction of an exclusive cable franchise violated PCI's first amendment rights.⁵⁰ The court concluded that Los Angeles could not, consistent with the first amendment, grant an exclusive franchise to a single

44. Potential operators in Los Angeles must agree to provide, without compensation, two channels for use by the City of Los Angeles and by other government bodies, two channels for use by educational institutions, and two channels for use by the general public. The operator must also provide support staff and facilities to aid in programming. In addition, two channels must also be provided for lease to commercial users. *Preferred Communications*, 754 F.2d at 1400-01. These requirements appear to be consistent with the authorizing statute, CAL. GOV'T CODE § 53,066 (West Supp. 1985), which provides that a city, county, or combination of city and county, may "prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system." The statute specifically authorizes the franchising body to consider "quality of service, rates to the subscriber, income to the [franchising body], experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest. . . ." *Id.*

45. In addition to channel and support service provisions, Los Angeles requires potential operators to pay a \$10,000 filing fee and a \$500 good faith deposit and agree to pay up to \$60,000 to reimburse Los Angeles for auction expenses. A potential operator must provide a detailed nine-year plan and convince Los Angeles it has a sound financial base, the proper character and experience, and a sound approach to the business operation of the cable system. *Preferred Communications*, 754 F.2d at 1400.

46. *Id.* at 1399-1400. Los Angeles divided the city into a number of districts for the purposes of granting cable franchises. It has been estimated that the South Central District contains over 180,000 homes. See Amicus Curiae Brief of the City of Torrance in Support of Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc at 5, *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.), *reh'g denied*, 1985 Trade Cas. (CCH) ¶ 66,773 (9th Cir.) (en banc), *affirmed in part and remanded*, 54 U.S.L.W. 4542 (U.S. June 3, 1986) (No. 85-390).

47. *Preferred Communications*, 754 F.2d at 1401.

48. *Id.* at 1399.

49. *Id.* In considering a motion to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6), the district court was required to accept as true plaintiff PCI's allegations. *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (per curiam).

50. *Preferred Communications*, 754 F.2d at 1411.

cable television system operator for a given region of the city, when the public utility facilities in that region are physically capable of accommodating more than one system.⁵¹ The court also held that Los Angeles' franchising process was invalid because it created an "impermissible risk" of covert discrimination by government officials opposed to views expressed or content contained in the operator's proposed programming.⁵² PCI had also argued on appeal that Los Angeles' conditioning the grant of a license upon an agreement that the operator provide public access channels and other services violated PCI's first amendment rights.⁵³ The court refused to rule on this issue.⁵⁴

51. *Id.*

52. *Id.* at 1409.

53. *Id.* at 1401. The *Preferred Communications* decision also addressed charges by PCI that Los Angeles' franchising process violated antitrust laws. *Id.* at 1411-15. The Ninth Circuit found that Los Angeles' exclusive franchise auction qualified for state sovereign immunity from liability under the Sherman Act. *Id.* The Ninth Circuit also held that state antitrust immunity was not dependent upon the constitutionality of Los Angeles' regulation of speech; that is, that the antitrust and first amendment claims were separate. *Id.* at 1415. Sovereign immunity from liability under the antitrust laws was recognized in *Parker v. Brown*, 317 U.S. 341 (1943). Although the Supreme Court has since held, in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (plurality opinion), that cities do not automatically share in this immunity, the Ninth Circuit interpreted *Lafayette* to allow the grant of state immunity to cities for those activities which the city conducted in accordance with a state policy which was "clearly articulated and affirmatively expressed." *Preferred Communications*, 754 F.2d at 1411 (quoting *Lafayette*, 435 U.S. at 410). The Ninth Circuit found that Los Angeles' franchising auction qualified for state immunity since the activity was within an express state policy to "displac[e] competition with regulation or monopoly in the area of cable television." *Preferred Communications*, 754 F.2d at 1412. The court found that Los Angeles' franchising auction was within the specific powers of regulating the development of cable television delegated by the California legislature. *Id.* at 1412-13.

The Ninth Circuit distinguished the Supreme Court's ruling in *Community Communications Co. v. City of Boulder (Boulder I)*, 455 U.S. 40 (1982), in which the Supreme Court denied state antitrust immunity to Boulder for that city's attempt to impose restraints on competition between cable companies. The Ninth Circuit distinguished *Boulder I* from the case before it in that the delegation of authority relied on by the city in *Boulder I* was a general home rule provision which did not specifically address cable television regulation. *Preferred Communications*, 754 F.2d at 1413. The Ninth Circuit also noted another recent Supreme Court decision indicating that a state need not actively supervise policies authorizing anticompetitive conduct by its cities. *Preferred Communications*, 754 F.2d at 1412, 1414 (citing *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1720-21 (1985)).

A number of jurisdictions have upheld cities' franchising power against antitrust suits. See *Catalina Cablevision Ass'n v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984); *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982).

54. We do not decide the validity of any of the specific requirements called for by the City's franchising process. In particular, we do not decide whether the City may validly require cable operators to turn over channels for use by the government, by educational institutions, and by the public and for leased use by others.

Preferred Communications, 754 F.2d at 1401 (footnote omitted). However, in an accompanying footnote, the Ninth Circuit noted that the channel access provisions contained in Los Angeles' franchise procedure were consistent with the Cable Act, §§ 611-612, 98 Stat. at 2782-85 (to be codified at 47 U.S.C. §§ 531-532), and suggested that these access provisions raised particularly troubling constitutional questions. *Preferred Communications*, 754 F.2d at 1401 n.4.

Amici suggested to the court in a brief supporting a petition for rehearing that the court's decision

In its decision, the Ninth Circuit first ruled that PCI enjoyed some type of first amendment protection.⁵⁵ The court then identified physical scarcity of radio waves as the aspect of broadcast television which allows government interference with the speech of television broadcasters, and found that cable television did not share this characteristic insofar as the physical limits of surplus space on a utility pole does not restrict use to a single cable.⁵⁶ However, the court conceded that reasonable regulation of the noncommunicative aspects of cable systems would be valid.⁵⁷ Using the reasonableness test developed by the Supreme Court in *United States v. O'Brien*,⁵⁸ the Ninth Circuit held that Los Angeles' restrictive franchise scheme was unconstitutional because: (1) it was broader than necessary to satisfy Los Angeles' interest in the use of its public facilities, and (2) the grant of an exclusive franchise posed too great a risk of discrimination by public officials who might disagree with the operator's views.⁵⁹ The court bolstered this conclusion with a finding that the surplus utility pole space was a kind of public forum.⁶⁰ Finally, the court summarily rejected Los Angeles' contention that the availability of access to PCI of a limited

might be interpreted as suggesting that franchising as a general concept was invalid. Amici also suggested that the court revise its opinion to make it clear that the court did not hold franchising invalid generally. See Brief of Amici Curiae of the City of Palo Alto [hereinafter cited as Brief of Amici] at 2-11, *Preferred Communications*. The court later amended its decision to contain the further caveat that "[n]othing in this opinion is inconsistent with a city-operated franchise system that respects First Amendment rights. Congress must be presumed to have envisioned such a system." See Order filed June 13, 1985, 1985 Trade Cas. (CCH) ¶ 66,773 (9th Cir. 1985) (en banc) (amending *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985)). These changes appear in the published opinion as the last two sentences of the first full paragraph on page 1410. According to the amending order, these sentences should instead appear at the end of footnote 11 on page 1411. See Order, *supra*. The error in publication does not significantly affect the decision.

55. *Preferred Communications*, 754 F.2d at 1403.

56. *Id.* at 1403-04. Due to the procedural posture of the case, the court ruled on only one justification for regulation conceded by PCI: the disruption of Los Angeles' public resources. The court disposed of Los Angeles' natural monopoly justification for regulation based upon FED. R. CIV. P. 12(b)(6), which requires a court to take plaintiff's allegations as true. See *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (per curiam). Because PCI alleged that it could compete in the South Central District, the court assumed that a natural monopoly did not exist. *Preferred Communications*, 754 F.2d at 1404. PCI also alleged that city utility pole space was available to receive its cable. Consequently, the court was bound to assume that physical pole scarcity did not exist. *Id.* See also *infra* notes 168-85 and accompanying text.

57. *Preferred Communications*, 754 F.2d at 1405. See also *infra* text accompanying notes 139-41.

58. 391 U.S. 367 (1968). The *O'Brien* test is set out *infra* in the text accompanying notes 128-29.

59. *Preferred Communications*, 754 F.2d at 1409-10.

60. *Id.* at 1409. The Ninth Circuit found that its conclusion was "aided by Supreme Court cases shaping the public forum doctrine." *Id.* at 1407. The D.C. Circuit has since observed that in *Preferred Communications* the Ninth Circuit "seemed to use the [public forum] doctrine merely as additional support for a conclusion already reached on other grounds." *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1338 (D.C. Cir. 1985). A possible explanation for the Ninth Circuit's treatment of the public forum doctrine is presented *infra* at note 104.

number of channels on another operator's system was an adequate substitute for the operation of an entire system.⁶¹

III. ANALYSIS OF THE *PREFERRED COMMUNICATIONS* DECISION

In *Preferred Communications* the Ninth Circuit faced three significant questions. First, the court considered the proper role of the government in regulating the use of its property for first amendment expression.⁶² Second, the court evaluated the first amendment interests of cable television operators and viewers. Third, the court faced the question of what government interests justified restriction of speech in the cable television medium. The Ninth Circuit's treatment of these issues left many questions unanswered.

A. *The Public Forum Doctrine*

The Ninth Circuit was the first court to apply the public forum doctrine in the cable television franchising context.⁶³ The court suggested that the public forum analysis supported its conclusion that Los Angeles' interest in regulation was not enough to outweigh PCI's right to freedom of speech under the *O'Brien* test.⁶⁴ Although the Ninth Circuit began its analysis by applying the *O'Brien* test, it should have begun by applying the public

61. *Preferred Communications*, 754 F.2d at 1410-11.

62. See generally *supra* note 31.

63. The two circuits which have previously considered a cable operator's first amendment right of access to government property did not use the public forum analysis, but instead balanced the competing interests of the government and the cable operator. See *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Community Communications Co. v. City of Boulder (Boulder II)*, 660 F.2d 1370, 1375-80 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). See also *Century Federal, Inc. v. City of Palo Alto*, 579 F. Supp. 1553 (N.D. Cal. 1984) (refusing to dismiss first amendment claim); *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982) (dismissing first amendment claim).

Since the *Preferred Communications* decision, the D.C. Circuit has applied the public forum analysis. See *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1337-39 (D.C. Cir. 1985). *Key West* involved a suit against the government for refusing to allow a cable company to continue operating a cable television system on an air force base in Florida. The United States moved to dismiss under FED. R. Civ. P. 12(b)(6) for failure to state a claim. *Id.* at 1333. The court noted the cable operator's allegation that "[t]here are no legal or practical reasons why two companies cannot compete directly to provide cable television services to customers at Homestead Air Force Base." *Id.* at 1335 (citation omitted) (brackets in original). The court held this claim foreclosed investigation as to the reasonableness of the government's exclusion of the operator once the court was satisfied that the operator raised a first amendment issue. *Id.* at 1335-39. Because the court determined that a first amendment issue was presented, *id.* at 1336-37, it held that dismissal of the claim was improper. *Id.* at 1338. In a footnote, the D.C. Circuit questioned whether the public forum analysis was the most appropriate analysis for the case. *Id.* at 1339 n.4. The court erroneously suggested that the public forum analysis focused upon the message rather than the medium. *Id.* The court's reasons for this conclusion are not clear and no support is provided.

64. See *infra* text accompanying notes 124-29.

forum doctrine because that doctrine, in some cases, provides the government greater latitude in its regulation of speech than would the *O'Brien* test. Application of the *O'Brien* test would be superfluous in such a case. The public forum analysis was appropriate in the present case because the rights of way and utility poles on which PCI wished to hang cable belonged to the government.⁶⁵

1. *The Doctrine*

When property used for speech purposes is owned by the government, the government may, under certain circumstances, restrict speech on the property. The degree to which the government may exclude speakers from a forum depends upon how the forum in which the speech takes place is characterized. In some cases the government may treat property in such a way that speakers may be excluded.⁶⁶

The Supreme Court developed the public forum analysis as a way to determine when the government's interest in limiting the use of its property outweighs the competing interests of those wishing to use the property for first amendment activity.⁶⁷ Under this analysis, a court first identifies the property to which the plaintiff seeks access. The court must then attempt to place the property to which access is sought into one of three categories: (1) traditional public forums; (2) public forums by governmental designation; and (3) nonpublic forums.⁶⁸ If the property cannot be placed in one of these categories, the court must conclude that the property is not a recognized forum. The "nonforum" may be considered a residual fourth category in the forum analysis.⁶⁹

a. *Considerations in Categorizing the Forum*

The court's characterization of the forum is important because that characterization will determine the government's ability to exclude

65. The court apparently assumed that the utilities involved were publicly owned. *Preferred Communications*, 754 F.2d at 1404 ("the City has held itself out as a provider of space on its utility poles. . . ."); *id.* at 1409 ("[A]s to City-owned structures, PCI alleges that the Los Angeles Department of Water and Power has held itself out to cable companies as a provider of pole-attachment services.").

66. See *infra* notes 94–101 and accompanying text.

67. The government has an interest in preserving its property for the uses to which the property was originally dedicated. *Greer v. Spock*, 424 U.S. 828, 836 (1976) (principal function of military installation is training of soldiers and not provision of public forum; military commander's power to exclude civilians is unquestioned). See also *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (state has power to prohibit demonstration on nonpublic property adjacent to county jail).

68. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 105 S. Ct. 3439, 3449 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). These forums are defined *infra* in text accompanying notes 89–102.

69. See *infra* notes 84–85 and accompanying text.

potential speakers. If the property used for speech is a public forum, the government can legally exclude speakers only if the exclusion serves a compelling government interest and the exclusion is narrowly drawn.⁷⁰ However, if the property is a nonpublic forum, the government can exclude speakers based on speaker identity if the exclusion is reasonable and viewpoint neutral.⁷¹

In categorizing the forum as public or nonpublic, a court must determine the government's intent in opening the forum. In making this determination, the court looks to the policy and practice of the government in allowing the property to be used for communication.⁷² To determine the government's policy, the court should consider the nature of the property. If the nature of the property is inconsistent with the expressive activity in question, the court should not infer that the government intended to open the property as a public forum.⁷³

Not all property used for communication is a public forum.⁷⁴ A public forum cannot be found where the government has clearly indicated a contrary intent.⁷⁵ The Supreme Court has ruled that the government's grant of selective access does not create a public forum in the absence of evidence that the government intended to designate the forum as such.⁷⁶ However, the government's limitation on access to the property is not dispositive in determining whether the government intended that the forum be public.⁷⁷ Rather, the government's limitation is only one relevant factor.⁷⁸

In considering whether the government intended to create a public forum, a court must also determine whether the government created the forum primarily to increase the amount of expressive activity occurring on the property.⁷⁹ If the government's primary purpose in creating the forum was to increase the amount of expressive activity on its property, this is evidence that the forum was intended to be a public forum.⁸⁰

70. See *infra* notes 90, 98.

71. See *infra* note 101.

72. *Cornelius*, 105 S. Ct. at 3449 (citing *Perry Educ. Ass'n*, 460 U.S. at 47).

73. *Cornelius*, 105 S. Ct. at 3450.

74. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981). This is true even if the property used for communicative purposes is used by the government. *Cornelius*, 105 S. Ct. at 3450.

75. *Cornelius*, 105 S. Ct. at 3450.

76. "Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Id.* at 3451 (citation omitted). The Court in *Cornelius* found that the Civil Service Commission and the Office of Personnel Management used extensive admission criteria to screen applicants to the federal charity drive to which the plaintiff legal defense fund sought access. *Id.*

77. *Id.*

78. *Id.*

79. See, e.g., *id.*; see also *infra* note 80.

80. Although the Supreme Court's recent ruling in *Cornelius* is not explicit on this point, the case

In cases where the Supreme Court has found a nonpublic forum, the Court has focused upon the nature of speaker access. However, in each of those cases the audience was also either “nonpublic” or a “nonaudience,” that is, the audience was composed of either a group of persons separated from the general public,⁸¹ or persons primarily occupied with matters unrelated to the communication.⁸² If a nonpublic audience or a nonaudience is an unstated prerequisite for a nonpublic forum, then cable television should not be considered a nonpublic forum.⁸³

suggests that if the government has opened a forum primarily for communicative purposes, this is likely to be conclusive evidence that the forum created is a public forum. In *Cornelius*, the Supreme Court found a nonpublic forum had been created, in part because the Court found that the government had not created the charity drive “for purposes of providing a forum for expressive activity” but rather “to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by lessening the amount of expressive activity occurring on federal property.” 105 S. Ct. at 3451 (emphasis in original). It logically follows that where the government’s action results in a significant increase in communication on government property, this is evidence that the government has acted to create a public forum. See also *Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors*, 776 F.2d 431, 436–37 (3d. Cir. 1985) (although athletic field to which plaintiffs sought access for a nuclear disarmament peace fair had occasionally been used by groups for community events, the field was not primarily dedicated for expressive activity and this was evidence that it was not a public forum).

However, earlier Supreme Court cases are not in accord with this logical extrapolation. In *Perry Education Association*, the Supreme Court found teachers’ school mailboxes to be nonpublic forums even though the primary purpose of the mailboxes and the primary purpose of the school communication system were communicative. *Perry Educ. Ass’n*, 460 U.S. at 37. This was also true of the advertising spaces on city buses in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion), which were also dedicated primarily for communication by nonpolitical advertisers. The government’s dedication for the advertising space in *Lehman* significantly increased the amount of expressive activity on the city’s buses, but no public forum was found. There is therefore some authority for suggesting that even though the primary purpose of the dedicated surplus space in *Preferred Communications* was communication, because the government selected the participants of the forum and did not indiscriminately open it up to all cable operators, the government did not create a public forum. When the Supreme Court considers *Preferred Communications*, it will have the opportunity to clarify the significance, with respect to the public forum doctrine, of the primary use of government property for communication. See also *infra* notes 81–82 and accompanying text.

81. See, e.g., *Cornelius*, 105 S. Ct. 3439 (federal employees at work); *Perry Educ. Ass’n*, 460 U.S. 37 (state teachers at work); *Greer*, 424 U.S. 828 (soldiers on military installation). But see *Student Coalition for Peace*, 776 F.2d 431 (public attending community events at school athletic field).

82. See, e.g., *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (public riding city buses).

83. It is possible to discern a pattern in the factual circumstances of nonpublic forum cases decided by the Supreme Court. This pattern suggests that one common element of nonpublic forums is a nonpublic audience. See *supra* note 82 and accompanying text. It is but a small step to conclude that the existence of a nonpublic audience may be determinative of the nonpublic status of a forum on government property. If the composition of the audience that will be reached by the operator is a significant element in the characterization of the forum, it will make some difference what the probable audience of the system will be. The court may be able to determine the probable audience in part based upon the access to government property sought by the operator.

The Ninth Circuit found that PCI sought access to surplus utility pole space, but neither PCI nor the court defined with particularity which surplus pole space PCI intended to use. If PCI intended to use surplus pole space on all poles in the district, this would indicate that the cable system would be available to all members of the public in the district since cable would be available to all members of the

It is not clear what limitations the government faces in restricting speech on property which has not been designated as a forum and on which the government has not permitted speech. However, Supreme Court cases suggest that the government may not arbitrarily prohibit speech on its property.⁸⁴ The categorization of a forum as a nonforum would therefore have the same effect as categorizing the forum as nonpublic, for in either case the government's exclusion must be reasonable and content-neutral.⁸⁵

The reasonableness of the government's action depends upon its justifications for prohibiting speech,⁸⁶ and also upon whether the surplus pole

public at the same price.

On the other hand, if PCI intended to install cable on surplus pole space on only some of the poles, this would indicate that the public property would be used to reach only part of the public which might desire access to the cable system since members of the public who resided in parts of the district which had not been wired would be effectively denied access.

This type of denial of access is distinguishable from a purely economic barrier to access imposed, for example, by expensive theater tickets which distribute the cost equally to all members of the theater audience. In the theater example, each member of the public who can afford the price of a seat pays equally for the same opportunity to view the show. Theater-goers are not forced to pay different prices for the same opportunity. In contrast, an individual living in a neighborhood which was not profitable to wire with cable would be denied access to cable programming, not due to an inability of the individual to pay a fair share of the costs of the system, but because too few of the individual's nearby neighbors could afford the service. This denial of access is based on what might seem to the individual to be an arbitrary circumstance; that is, the individual's decision to live in a certain area of town. The denial of access might also be viewed as based upon the individual's status as a member of a less wealthy neighborhood.

If PCI intended to install cable only on the surplus space of poles located in wealthier neighborhoods, only that space should be analyzed according to the public forum analysis. Since the audience of the cable system would be limited to a segment of the public, the audience might qualify as a nonpublic audience. See *supra* text accompanying note 81. If PCI sought access to a nonpublic audience, this might convert the limited surplus pole space which PCI sought to use into a nonpublic forum despite the fact that the primary use of the space was communicative. See *supra* note 80.

84. One circuit recently applied the public forum doctrine in a case which raised first amendment interests of a cable operator denied access to government property. In *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985), the D.C. Circuit interpreted the Supreme Court's public forum analysis as saying that speakers could not be excluded from a nonforum unless the government could show that the exclusion was reasonable. *Id.* at 1338; see also *supra* note 63. The court relied upon a footnote in a Supreme Court decision which stated that government prohibition of speech on government property must be reasonable. See *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981). This footnote was also cited by the Supreme Court in *Perry Educ. Ass'n*, 460 U.S. at 46, in describing the standard for exclusion from a nonpublic forum. Both *Perry Educ. Ass'n* and *Council of Greenburgh* concerned government property already being used for communication. The same is true of *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), cited in *Council of Greenburgh*, 453 U.S. at 131 n.7. It may be the case, therefore, that government property which has not been used for any communication may be closed to speech without justification.

85. The reasonableness standard is much less difficult for the government to satisfy than the incompatibility test for use of nonforum property proposed by Justice Brennan and discussed *infra* at note 104 and accompanying text. An absolute prohibition on the use of certain utility pole space would probably be inherently content-neutral.

86. The Supreme Court has held a number of government interests sufficient to justify limitations upon expression. Mininberg lists six examples of government interests which justify prohibition of

space necessary for cable speech represents a forum for which no substitute exists.⁸⁷ When the government excludes cable operators from surplus space which would serve as a forum for cable television communication, the reasonableness of the exclusion will depend upon the Supreme Court's characterization of the relative substitutability of other media for the cable television medium.⁸⁸

b. Types of Forums

A traditional public forum is a place which has been used for public assembly and debate for a long period of time.⁸⁹ The government cannot exclude speakers from a traditional public forum unless the exclusion is necessary to serve a compelling government interest and is narrowly drawn to that end.⁹⁰

A public forum by designation is created when the government dedicates certain property as a "place or channel of communication" for first amendment free speech activities.⁹¹ This type of forum is distinguishable from the traditional public forum in three respects. First, the forum is not a public forum by virtue of its nature, but because the government has designated it as such.⁹² Second, the government need not keep the forum open to the public indefinitely, but may close it for speech purposes at some future

speech: (1) state security, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); (2) personal reputation, *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964); (3) personal privacy, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 (1975); (4) administration of justice, *Cox v. Louisiana*, 379 U.S. 559, 562-63 (1965); (5) public morality, *FCC v. Pacifica Found.*, 438 U.S. 726, 737-41 (1978); and (6) truth in commercial speech, *Friedman v. Rogers*, 440 U.S. 1 (1979). *Mininberg*, *supra* note 31, at 594 n.256. To this list might be added the preservation of community visual aesthetics. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), discussed *infra* at note 108.

87. *See infra* note 102.

88. *See infra* note 133 and accompanying text.

89. Parks and streets are often used as examples of traditional public forums:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. CIO, 307 U.S. 496, 515 (1939). *See also* *United States v. Grace*, 461 U.S. 171 (1983); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

90. *Perry Educ. Ass'n*, 460 U.S. at 45. *See also* *Carey v. Brown*, 447 U.S. 455, 461 (1980). This is essentially the equivalent of the *O'Brien* test employed by the Ninth Circuit and discussed *infra* in the text accompanying notes 124-31.

91. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 105 S. Ct. 3439, 3449 (1985). *See, e.g.,* *Widmar v. Vincent*, 454 U.S. 263 (1981) (school classrooms used by students); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theater).

92. *See infra* note 104.

time.⁹³ Third, the government may designate that the forum be used by a limited class of speakers or for the discussion of a limited range of subjects.⁹⁴ Apart from these differences, designated public forums impose the same restrictions upon governmental exclusion of speakers that are imposed by traditional public forums; that is, the exclusion must be necessary to serve a compelling government interest and be narrowly drawn to that end.⁹⁵

Designated public forums may be of two types. The first type is not limited according to the type of speaker or the subject to be discussed and is therefore identical to the traditional public forum so long as it remains open. The second type, which is limited to certain types of speakers or to certain subjects, is sometimes referred to as a "limited public forum."⁹⁶ The government may not arbitrarily restrict the use of a limited public forum to a group of speakers or to the discussion of certain subjects, but may justify limiting the forum if the speech of other speakers or the discussion of other topics would be inconsistent with the government's use of the property.⁹⁷ If the speech excluded would be inconsistent with the government's other uses of the property, this inconsistency provides a compelling justification for excluding the speech.⁹⁸

The government may also create a forum which is even more exclusive—a nonpublic forum.⁹⁹ The government creates a nonpublic forum where

93. *Perry Educ. Ass'n*, 460 U.S. at 46.

94. *Cornelius*, 105 S. Ct. at 3449; *Perry Educ. Ass'n*, 460 U.S. at 45, 46 n.7; *Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors*, 776 F.2d 431, 436 (3d Cir. 1985). For example, the government may limit the use of a public forum to student groups, *Widmar v. Vincent*, 454 U.S. 263 (1981), or to the discussion of school board business, *City of Madison Joint School Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976).

95. *Perry Educ. Ass'n*, 460 U.S. at 46 & n.7.

96. See, e.g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (state fair is limited public forum).

The concept of a limited public forum was applied by the First Circuit as long ago as 1973. See *Bonner-Lyons v. School Comm.*, 480 F.2d 442, 443 & n.2 (1st Cir. 1973) (school authorities sanctioned the use of the school distribution system as a forum for discussion of school busing). The court in *Bonner-Lyons* did not use the expression "limited public forum," but the *Bonner-Lyons* case was later cited by courts which described its holding in those terms. See *International Soc'y for Krishna Consciousness, Inc. v. Schrader*, 461 F. Supp. 714, 718 n.4 (N.D.Tex. 1978); *Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found.*, 417 F. Supp. 632, 639 & n.9 (D.R.I. 1976).

97. *Cornelius*, 105 S. Ct. at 3458 (Blackmun, J., joined by Brennan, J., dissenting) (citing *City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n.*, 429 U.S. 167, 175 n.8).

98. *Cornelius*, 105 S. Ct. at 3458 (Blackmun, J., joined by Brennan, J., dissenting).

99. An example of this type of forum is a combined charity drive aimed at federal employees and created by the government in order to minimize the disturbance caused by numerous individual charity drives. *Cornelius*, 105 S. Ct. 3439 (1985). See also *Perry Educ. Ass'n*, 460 U.S. 37 (1983), in which the Supreme Court upheld the school district's power to exclude a local teacher's association from using the internal mail systems of the district's schools.

either the principal function of the property would be disrupted by expressive activity or where neither the policy nor the practice of the government indicates that the forum was purposely dedicated to public use.¹⁰⁰ Unlike the public forum, from which the government may not exclude speakers absent a compelling interest, the government can exclude speakers from a nonpublic forum if its restrictions are reasonable and do not reflect government opposition to the speaker's views.¹⁰¹ However, the government may be restricted in its ability to exclude speakers from a public or nonpublic forum if the exclusion would leave potential speakers without access to a substitute forum.¹⁰²

c. Applying the Doctrine

The first step in the public forum analysis is identifying the specific property to which speakers seek access.¹⁰³ The court must next determine whether the property to which access is sought falls into one of the identified forums. The property may be a public forum by tradition. The only type of public forum other than a traditional public forum which can exist on government property is a designated forum. A designated public forum does not exist unless the government has taken affirmative steps to

100. *Cornelius*, 105 S. Ct. at 3450; see also *Student Coalition for Peace*, 776 F.2d at 436.

101. *Cornelius*, 105 S. Ct. at 3448, 3451; see also *Perry Educ. Ass'n*, 460 U.S. at 46; *Student Coalition for Peace*, 776 F.2d at 435. Regardless of the type of forum involved, the government may restrict the "time, place, and manner" of access to that forum. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535-36 (1980); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Restrictions of this sort must serve a significant government interest, be narrowly tailored and content-neutral, and leave open ample alternative channels of communication. See, e.g., *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069 (1984); *Perry Educ. Ass'n*, 460 U.S. at 45. The test for when the government may, without totally excluding speakers, restrict the access of speakers to a public forum is thus a less demanding test for the government to satisfy.

102. In both *Cornelius* and *Perry*, the Supreme Court justified its recognition of a nonpublic forum in part upon the observation that alternative channels of communication were open to the excluded speakers. *Cornelius*, 105 S. Ct. at 3453; *Perry Educ. Ass'n*, 460 U.S. at 53. In both cases, examples presented by the Court of alternative channels of communication were essentially equivalent in kind to the medium of communication made unavailable. *Cornelius*, 105 S. Ct. at 3453 ("alternative channels [to charitable solicitation at federal workplace] . . . includ[e] direct mail and inperson solicitation outside the workplace"); *Perry Educ. Ass'n*, 460 U.S. at 53 ("substantial alternative channels [to teacher mailboxes] that remain open for union-teacher communication" include bulletin boards, meeting facilities, and the United States mail). These cases suggest that some type of alternative forum for expression is required to justify exclusion from a nonpublic forum. However, it is not clear whether the alternative forum must be an essentially equivalent substitute for the forum to which access has been denied. Because exclusion from a public forum must satisfy an even more rigorous test, it follows that this requirement for an alternative forum, whatever its contours, must also be met in order to justify exclusion from a public forum.

103. *Cornelius*, 105 S. Ct. at 3448.

create it.¹⁰⁴ The government may also designate property as a nonpublic

104. "The government does not create a public forum by inaction . . . but only by intentionally opening a non-traditional forum for public discourse." *Cornelius*, 105 S. Ct. at 3449. See also *Student Coalition for Peace*, 776 F.2d at 436. The Ninth Circuit's relegation of the public forum analysis to a supporting role may be explained by the court's mistaken conclusion that it was not necessary for the government to have dedicated the surplus utility pole space as a public forum in order for the space to be considered a public forum. This conclusion is not consistent with Supreme Court decisions which have expressly rejected the notion that a nontraditional forum may become a forum other than by government designation. See *Cornelius*, 105 S. Ct. at 3449; *Perry Educ. Ass'n*, 460 U.S. at 46; *Council of Greenburgh*, 453 U.S. 114, 129.

The Court's position that a public forum may not be created through government inaction has consistently been challenged by Justice Brennan, who considers government property available for use as a forum so long as the use of the forum for speech is not incompatible with other uses to which the government has dedicated the property. *Cornelius*, 105 S. Ct. at 3459-60 (Blackmun, J., joined by Brennan, J., dissenting); *Perry Educ. Ass'n*, 460 U.S. at 62 n.6 (Brennan, J., dissenting); *Greer v. Spock*, 424 U.S. 828, 859-60 (1976) (Brennan, J., dissenting); see also *Council of Greenburgh*, 453 U.S. at 114 (Brennan, J., concurring). According to Justices Blackmun and Brennan, "[t]he guarantees of the First Amendment should not turn entirely on either an accident of history or the grace of the Government." Rather, "the First Amendment interests of those who seek access for expressive activity [should be balanced] against the interests of the other users of the property and the interests served by reserving the property for its intended uses." *Cornelius*, 105 S. Ct. at 3460 (Blackmun, J., joined by Brennan, J., dissenting).

The Supreme Court has recognized the Brennan analysis as clearly contrary to the majority position. *Perry Educ. Ass'n*, 460 U.S. at 50 n.9 ("JUSTICE BRENNAN'S attempt to build a public forum with his own hands is untenable . . ."). Justice Brennan agrees that his analysis cannot be squared with the majority's. *Cornelius*, 105 S. Ct. at 3459 (Blackmun, J., joined by Brennan, J., dissenting) ("The Court's analysis . . . turns these principles on end."). Nevertheless, the Second Circuit has adopted a forum analysis indistinguishable from that of Justice Brennan. See, e.g., *Gannett Satellite Information Network v. Metropolitan Transp. Auth.*, 745 F.2d 767, 773 (2d Cir. 1984) ("Public property . . . which is neither a traditional nor a designated public forum, can still serve as a forum for First Amendment expression if the expression is appropriate for the property . . . and is not 'incompatible with the normal activity of a particular place at a particular time.'") (citation omitted) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)). See also *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1054 (2d Cir. 1983); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 90 (2d Cir.), cert. denied, 393 U.S. 940 (1968).

The Ninth Circuit cited Second Circuit opinions and apparently adopted the Brennan analysis in *Preferred Communications*. The Ninth Circuit stated that "although the public utility poles and conduits are not public forums by tradition or designation, each may nevertheless serve as a forum for expression via the cable medium." *Preferred Communications*, 754 F.2d at 1408. The adoption of this alternative analysis is important because it allows the court to circumvent the public forum analysis prescribed by the Supreme Court and find a public forum where none has been dedicated, when the use of the property as a forum is not incompatible with the government's use of the property. If the court concluded that PCI's proposed use was compatible with the government's other use of the poles, PCI could then be excluded only in the face of a compelling government interest under regulations which were narrowly drawn.

Even if the Ninth Circuit was justified in using Justice Brennan's compatibility analysis, the court's reliance on *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), is misplaced. There seems little justification for favorably distinguishing *Vincent* from *Preferred Communications* based on the compatibility of the activities at issue. The Ninth Circuit distinguished *Vincent* because, unlike posting signs on utility poles, stringing cable is an activity which is basically compatible with the normal use of the poles; that is, the bearing of electric and telephone communication cables. It is not self-evident, however, that posting signs on a utility pole is "incompatible" with the use of those facilities. Furthermore, even though posting signs was obviously not the intended purpose of the utility

forum. Property which has not traditionally served as a public forum and which has not been designated as either a public or nonpublic forum by the government is not a forum; the public forum doctrine would therefore not apply.

If a court decides that the property represents a public forum, the court must decide whether the government has created a limited public forum. The government may limit access to a public forum to a certain class of speakers if use by speakers outside the included class would be inconsistent with the government's other uses of the property.¹⁰⁵

2. *Applying the Public Forum Doctrine to the Facts of Preferred Communications*

a. *Categorizing the Forum*

PCI sought access to the physical surplus pole space on Los Angeles' utility poles.¹⁰⁶ The Ninth Circuit was therefore correct in defining this surplus pole space as the relevant property.¹⁰⁷ The Ninth Circuit also correctly concluded that surplus utility pole space is not a forum by tradition.¹⁰⁸ The only other type of forum which the surplus space might represent was a public forum by designation or a nonpublic forum by designation.

The Ninth Circuit found that the surplus pole space to which PCI sought access was dedicated as a public forum.¹⁰⁹ Although surplus pole space does not resemble more traditional forums, it fits within the definition of property which may be used as a forum because the space is used as a "channel of communication."¹¹⁰ Because stringing television cable was

poles, it is not clear that stringing cable television cable is necessarily any more compatible with the purpose for which Los Angeles' utility poles were originally constructed. In fact, stringing additional cable may well interfere with the maintenance and future use of utility structures by utility companies. See also *infra* note 111.

105. See *supra* notes 91–98 and accompanying text.

106. *Preferred Communications*, 754 F.2d at 1400, 1409.

107. *Id.* at 1409. An alternative analysis of the relevant property is presented *supra* at note 83.

108. The Ninth Circuit began its application of the public forum doctrine by rejecting the argument that utility poles and conduits represent a traditional public forum merely because they are located on public rights-of-way. *Preferred Communications*, 754 F.2d at 1408. The court relied upon the recent decision, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), in which the Supreme Court ruled that Los Angeles had a valid interest in banning the posting of campaign signs on utility poles. *Id.* at 805–07. The city's interest was the advancement of aesthetic values through the elimination of visual clutter. *Id.*

109. *Preferred Communications*, 754 F.2d at 1409.

110. See *supra* note 91 and accompanying text. One court which has subsequently considered the application of the public forum doctrine in the context of cable franchising has questioned the usefulness of the doctrine. See *supra* note 63.

not inconsistent with the use made of the utility poles by the utility companies,¹¹¹ the Ninth Circuit could therefore infer that the government might have intended the surplus pole space to serve as a public forum.

Once the court was satisfied that the government might have intended the property to serve as a public forum, the court was bound to consider the government's policy and practice to determine whether the government did so intend. The court decided that a public forum had been designated due to California's statutory dedication of the surplus pole space for the accommodation of television cable,¹¹² and Los Angeles' representation of itself as a provider of pole space for this purpose.¹¹³ The court further reasoned that Los Angeles' franchising process indicated an effort by Los Angeles to open at least some of its facilities for use as a public forum by cable operators.¹¹⁴ In its opinion, the court did not consider whether the government's actions might have indicated that the property was intended to be used as a nonpublic forum or that the property was not intended to be used as any type of forum.

It is unlikely that the court could have reached the conclusion that the property was intended to be a nonpublic forum. First, the use of the pole space for television cable was not inconsistent with other uses to which the property had been dedicated.¹¹⁵ Second, the purpose of both California and Los Angeles in *Preferred Communications* was to aid the development of cable communications and increase the amount of expressive activity on the government property.¹¹⁶ The intent to use property primarily for

111. This is particularly true in *Preferred Communications* since the California statute authorizing the use of surplus pole space allows the government to require the removal or rearrangement of television cable if additional pole space is ever needed by one of the original utilities. See CAL. PUB. UTIL. CODE § 767.5(d) (West Supp. 1985).

112. PCI alleged that California's dedication of unused utility pole space applied to the pole space in the South Central District. *Preferred Communications*, 754 F.2d at 1409. However, the statute does not apply to publicly owned utility pole space. See CAL. PUB. UTIL. CODE § 767.5(a)(1) (West Supp. 1985) (exempting all publicly owned public utilities from the definition of "public utility"). Although the record does not disclose whether the utilities involved were publicly owned, the court appears to have assumed this was the case. See *supra* note 65. In fact, the utilities were publicly owned. See Brief for Appellee at 6 n.5, *Preferred Communications*. However, the applicability of the statute was not raised by Los Angeles in its appeal and was apparently ignored by the court. See Brief for Appellee at 6 n.5.

113. *Preferred Communications*, 754 F.2d at 1409.

114. *Id.*

115. See *supra* note 111.

116. The statute which dedicated the surplus utility pole space did so in the interests of the people of California rather than for the benefit of cable television corporations. CAL. PUB. UTIL. CODE § 767.5(b) (West Supp. 1985). The statute reads in part: "The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations." "Surplus space" is defined as "that portion of the usable space on a utility pole which has the necessary clearance from other pole users . . . to allow its use by a cable television corporation for a pole attachment." *Id.* at § 767.5(a)(4).

communicative purposes is evidence that the property was intended as a public forum. This is true despite the fact that Los Angeles did not freely grant permission to use its poles, but instead required potential cable system operators to participate in a complex review process.¹¹⁷ Thus, although Los Angeles expressly limited the access to the surplus pole space through the franchise process, indicating an intent to create a nonpublic forum, its creation of the forum primarily for communication suggests that the space should be categorized as a public forum. The court was correct in deciding this inconsistency in favor of the plaintiff.¹¹⁸ Because cable television systems will likely continue to be used primarily for expressive activity, it is unlikely that space dedicated for cable television systems could ever be categorized as a nonpublic forum.

The Ninth Circuit was also unlikely to have found that the surplus utility space to which PCI sought access was not a forum at all. The court found that a public forum had been dedicated based upon three factors: the California statute that dedicated unused pole space to use by cable television companies; Los Angeles' alleged representations of itself as a provider of television cable attachment services;¹¹⁹ and Los Angeles' franchise auction itself. However, these factors may also be consistent with a conclusion that the surplus space to which PCI sought access was not a designated forum. Los Angeles' franchising process limits the franchise to one cable operator, which indicates a practice contrary to allocating the use of the surplus space. Even if Los Angeles had in the past acted so as to indicate a policy that all surplus space was available, Los Angeles' subsequent practice of conducting an exclusive franchise auction is an unambiguous reversal of such a policy.

The Ninth Circuit could have interpreted the inconsistency between the state and city governments' treatment of access to the surplus pole space in Los Angeles' favor, and determined that all dedicated surplus space had

The statute does not define "other pole users," but cable television system operators are not expressly excluded from this category. On its face, therefore, the statute appears to dedicate space to all cable television system operators whose use does not interfere with existing users, some of which may also use the poles for attaching television cable. The intent to provide the public with enhanced access to cable television communication may be inferred from this dedication.

Similarly, although Los Angeles' award of a cable television franchise was in a sense a limitation upon expression due to the exclusive nature of the franchise award, the franchise did not limit expression already taking place, but resulted in an increase in the total amount of expression occurring on its property. In this way, Los Angeles' purpose is distinguishable from the purpose of the government in *Cornelius*. See *supra* note 80.

117. See *supra* notes 44–45.

118. The court was obliged to rule against Los Angeles because all doubts are resolved in favor of the plaintiff on a 12(b)(6) motion. *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 834–35 (9th Cir. 1980).

119. PCI alleged that Los Angeles had held itself out as a provider of cable installation services. See *supra* notes 112–16 and accompanying text.

been allocated by Los Angeles and that PCI sought access to a nonexistent forum. However, due to the procedural posture of the case, the court was bound to rule in favor of the plaintiff and find that the government had dedicated all surplus utility pole space as a forum.¹²⁰

Los Angeles did not attempt to show that PCI's use of the surplus space was inconsistent with its other uses of the utility pole space. Therefore the surplus space did not represent a limited public forum.¹²¹

b. The Consequences of Finding a Public Forum

Since the court characterized the surplus pole space as a public forum, Los Angeles had the burden of showing that its refusal to allow PCI to construct and operate a cable system served a compelling government interest and that Los Angeles' restriction was narrowly drawn to serve that interest.¹²² This combination of requirements is essentially the *O'Brien* test which the Ninth Circuit used to balance the interests of PCI in installing and operating a cable system against the competing interests of Los Angeles in excluding a second cable operator from the South Central District.¹²³ Therefore, had the Ninth Circuit correctly applied the public forum analysis in determining first the existence and then the character of the forum, the court would have reached the same result.

B. Resolving the Competing Interests of the Government and the Potential Cable Operator

The first amendment acts to preserve an uninhibited marketplace of ideas.¹²⁴ In this marketplace, the collective rights of viewers and listeners are paramount to the rights of those who wish to speak.¹²⁵ The government may therefore restrict the speech of some so that others may be afforded a chance to speak, because in doing so the government ensures that the public is provided with the widest possible diversity of opinion.¹²⁶

120. See *supra* note 118.

121. A limitation to a particular class of speakers would probably have made no difference in the *Preferred Communications* case since PCI probably qualifies as being in the same class as the operator who was successful in obtaining the exclusive franchise.

122. See *supra* note 90 and accompanying text.

123. See *infra* text accompanying notes 124–29.

124. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795–96 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

125. *Red Lion*, 395 U.S. at 390 (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361–62 (1955)). See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial speech protected under first amendment because of public's right to know).

126. Thus, media participants may not use the first amendment as a shield from antitrust laws; the

However, the government may not suppress speech because it disagrees with the speaker's viewpoint,¹²⁷ nor may the government restrict speech arbitrarily. These limitations upon the government's power were concisely expressed by the Supreme Court in the test set out in *United States v. O'Brien*.¹²⁸ According to the *O'Brien* test, a government restriction on speech violates the first amendment unless:

it is within the constitutional power of the Government; . . . it furthers an important or substantial governmental interest; . . . the governmental interest is unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹²⁹

The *O'Brien* test applies only to activity protected by the first amendment.¹³⁰ Therefore, before the test may be applied the court must decide whether the restricted communication qualifies as protected speech. If the court finds that the government's action has placed a burden upon protected speech, the court must then determine whether the government has a substantial interest in restricting protected speech. The court must also decide whether the restriction was any greater than necessary to serve the government's interest and whether the government has impermissibly excluded speech on the basis of the speaker's viewpoint.

1. *Determining the Cable Operator's First Amendment Interest*

a. *The Need to Define the First Amendment Interest Involved*

The Ninth Circuit analysis was incomplete regarding PCI's first amendment interests. The court ruled that PCI enjoyed at least some type of first

government may regulate the development of monopolies within the media in order to preserve diversity. This is because:

[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some.

Associated Press v. United States, 326 U.S. 1, 20 (1945).

127. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *see also* *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

128. 391 U.S. 367 (1968).

129. *Id.* at 377.

130. *See, e.g., Cornelius*, 105 S. Ct. at 3446 ("[W]e must first decide whether [the] solicitation . . . is speech protected by the First Amendment, for, if it is not, we need go no further.").

amendment protection.¹³¹ This ruling shifted the burden to Los Angeles to show that its regulation of cable television did not violate PCI's rights under the first amendment.¹³² The court did not critically evaluate PCI's interests under the first amendment because it considered the government's interests to be insubstantial. Had the Ninth Circuit considered the more substantial justifications for government regulation, the court would have found it necessary to examine the interests of the potential operator more thoroughly. The first amendment analysis affirmatively requires such consideration of the extent of protection under the first amendment in any event in order to better analyze the impact of the government's exclusion.

b. The Nature of Cable System Operation

To determine the first amendment protections of speakers in the cable medium, the unique characteristics of that medium must be analyzed.¹³³ The cable operator is involved in both communicative and noncommunicative activities. Only the communicative activities of the operator are protected under the first amendment.¹³⁴ These activities include the selection of programming produced by others, the editing of programming produced by others, and the creation of original programming. The Ninth

131. *Preferred Communications*, 754 F.2d at 1403. See also *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder (Boulder II)*, 660 F.2d 1370, 1376 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). Since *Preferred Communications* was decided, the D.C. Circuit has twice held that cable operators engage in "some type" of protected conduct. See *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1444 (D.C. Cir. 1985); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336 (D.C. Cir. 1985).

132. A statute is presumed to be constitutional. *Queets Band of Indians v. Washington*, 765 F.2d 1399, 1404 (9th Cir. 1985) (citing *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827)). Therefore, a plaintiff challenging the constitutionality of the statute must usually assume the burden of proving its unconstitutionality. *Id.* However, when a statute imposes a restriction upon speech, the burden is on the government to show that the statute does not go too far in its interference with the right at issue. *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

133. *FCC v. Pacifica Found.*, 438 U.S. 736, 748 (1978); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring); *id.* at 96 (Frankfurter, J., concurring). The Supreme Court has considered the unique characteristics of diverse media in determining first amendment protections. See, e.g., *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (billboard advertising); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (radio broadcasting).

134. A good illustration of this point is made by comparing the provision of cable television service and providers of telephone communication services. Telephone companies, whose physical facilities resemble the facilities of cable operators, have never been protected by the first amendment even though telephone users do enjoy first amendment protection in their communicative use of telephones. See Brief of Amici, *supra* note 54, at 8 n.4 (citing *Walker v. Dillard*, 523 F.2d 3 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975)).

Circuit correctly observed that the selection of programming by cable programmers is similar, for first amendment considerations, to the editorial function performed by newspapers, theater owners, booksellers, and concert promoters.¹³⁵ The Supreme Court has held that the selection of programming produced by others is an activity which is protected to the same extent as the creation of original programming or the editing of programming produced by others.¹³⁶ Otherwise, protection would extend only to those who have original thoughts.¹³⁷ If the selection of nonoriginal programming is protected, an operator should be protected in selecting as

135. *Preferred Communications*, 754 F.2d at 1410 n.10 (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974) (newspapers); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (movie theaters); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (booksellers); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567–68 (9th Cir. 1984) (concert promoters), *cert. denied*, 105 S. Ct. 2115 (1985)). The Ninth Circuit's position on this point was recently adopted by the D.C. Circuit which held that "[w]hether or not [a cable operator] produces any original programming of its own, its activities of transmitting and packaging programming mandate that it receive First Amendment protection." *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336–37 (D.C. Cir. 1985).

136. The Supreme Court has defined editorial discretion as the selection and choice of material. *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973). Although in *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689, 707 (1979), the Court recognized that cable operators have "a significant amount of editorial discretion regarding what their programming will include" the Court was careful to note that it did not suggest that this editorial discretion was of the same magnitude as that enjoyed by broadcasters. *Id.* at 707 n.17.

Two commentators have suggested that the editorial function of cable operators should not qualify as protected speech. Miller and Beals state that:

[T]he cable operator's purpose in choosing programming . . . is not to participate in public discussion or to express ideas Rather, the operator is merely exercising a business judgment as to which product will sell best. To the extent that this judgment involves speech, that speech is related primarily to the operator's economic interests and therefore receives only limited first amendment protection.

Miller & Beals, *supra* note 9, at 103 (footnotes omitted) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561–63 (1980); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977)).

This position has been thoroughly criticized. Lee, *supra* note 31, at 916 n.213. Professor Lee attacked the Miller and Beals analysis on five grounds. (1) The Supreme Court has held entertainment to be no less protected than the discussion of ideas. *Winters v. New York*, 333 U.S. 507, 510 (1948). (2) Other protected media allow third parties to utilize their facilities, such as newspapers which print and carry inserts assembled by third parties. (3) Other protected media retransmit expression of others without significantly adding to content, such as speeches reprinted in newspapers. (4) The profit motive does not affect first amendment rights. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). (5) The case of *Central Hudson*, on which Miller and Beals relied, contained a definition of "commercial speech" which Professor Lee termed overly broad. Moreover, the speech of cable operators was not commercial speech under the alternative definition presented in *Central Hudson*, 447 U.S. at 562. Professor Lee was also disturbed by the lack of historical foundation for the proposition that acting as a conduit for transmission of communication created by others was somehow not protected under the constitution. Lee, *supra* note 31, at 916 n.213.

137. Such an interpretation of the first amendment has not been accepted. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

much nonoriginal programming as desired. A limitation may arise, however, if the programming is duplicative of other programming in the same market.¹³⁸

The potential operator's interests in obtaining access to channels may appear unique because the potential operator desires so much channel space. However, the communicative activities of the cable system operator are almost identical to the activities of individuals or groups who *lease* system channels. Although individuals who lease channels may more often be engaged in displaying programming which they have produced themselves, this need not necessarily be the case. Channel lessees may also assemble programming and solicit advertisers to support assembled programming just as a system operator might. However, operation of an entire cable television system might allow the operator to engage in the selection of more programming than would leased channel space on a portion of another operator's system. The potential operator's interest does not differ in quality from those leasing channels, only in quantity.

Cable operators engage in activities other than the selection and creation of programming. These activities include constructing the system, transmitting the signals, providing noncommunicative services,¹³⁹ and carrying broadcast channels required by the FCC.¹⁴⁰ Although potentially lucrative, these activities are not protected by the first amendment.¹⁴¹ In addition to the extra revenues which system ownership may produce, operating an entire system enables the operator to prevent others from using the system to compete with the operator's programming.¹⁴² However, the constitutional right to speak does not encompass the right to be the exclusive speaker.¹⁴³ A system operator's exclusion of others from the medium, although effective in increasing the probability that the operator's communication will be heard, is not necessary to ensure that the operator will be heard by those who want to listen.¹⁴⁴ The operator's interest in excluding

138. An exception to the general proposition that nonoriginal speech is equally protected is found in the case of cable systems which retransmit programming available through the broadcast medium. See *supra* notes 16-18 and accompanying text.

139. See *supra* note 9.

140. See *supra* note 16 and accompanying text.

141. See *supra* note 134.

142. Federal law currently forces operators to lease only a small portion of available channel space. See *infra* note 189.

143. "The right of free speech . . . does not embrace a right to snuff out the free speech of others." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387 (1969). See also *supra* text accompanying note 126.

144. Although competition for program viewership between the operator and programmers using leased channels may diminish the number of viewers a cable operator commands, this competition is not interference with the operator's speech. Competition from leased channel programmers does not resemble interference by hecklers whose speech the Supreme Court has suggested might be constitutionally regulated. *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949). Nor is such competition like a

others from the medium is therefore not protected by the first amendment.

If the potential operator's first amendment interests are identical to those of programmers who lease access on cable systems, then the first amendment interests of the potential operator are satisfied if channel space on another operator's system is available to the potential operator for lease. The cable system operator has an interest in operating a separate cable system only insofar as the cable operator has more programming to present than space on another operator's system permits. If available leased channel space is insufficient to accommodate the potential operator's programming, the potential operator has a first amendment interest in constructing a cable system.

2. *Evaluating the Importance of the Government's Interest in Restricting Speech*

The procedural posture of the case forced the court to accept PCI's allegations that neither scarcity of physical pole space nor market forces would prevent it from operating its system successfully.¹⁴⁵ As a result, the court considered only one of Los Angeles' justifications for restricting the use of its surplus utility pole space: Los Angeles' interest in minimizing the disruption of its streets.¹⁴⁶ The Ninth Circuit held that: (1) this interest was not substantial enough to justify Los Angeles' grant of an exclusive cable franchise because that action created too great a risk of viewpoint discrimination,¹⁴⁷ and (2) Los Angeles' restrictions were more restrictive than necessary to satisfy its interest in minimizing disruption of its streets.¹⁴⁸

simultaneous parade, which the government may reschedule. *See Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). Even if such competition diminished the operator's profits, and made selecting and creating programming more expensive, such an effect would not constitute an intrusion upon the operator's first amendment rights. While addressing the question of a cable operator's interest in obtaining maximum profits, the court in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 49 n.97 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), stated, "[I]n the absence of a showing of economic harm bordering on censorship, a diminution of profits does not itself present a First Amendment problem." The District of Columbia Circuit noted that such a result would require the invalidation of all general laws affecting the profitability of the movie industry. The court dismissed this conclusion as clearly contrary to established precedent. *Id.* at n.96 (citing *Associated Press v. United States*, 326 U.S. 1 (1945)).

145. *See supra* note 56.

146. "Cable television . . . requires the use of public facilities, and this provides a justification for some government regulation." *Preferred Communications*, 754 F.2d at 1406.

147. *See infra* note 150.

148. *Preferred Communications*, 754 F.2d at 1406 ("A different and more sharply focused response by the City could protect the legitimate interests of the City and its citizens.").

a. Discriminatory Regulation

The government may not restrict speech because of its content.¹⁴⁹ The Ninth Circuit concluded that Los Angeles' exclusive franchising process was invalid because it created an impermissible risk of content-based regulation.¹⁵⁰ This conclusion was not based upon a direct finding that Los Angeles' franchising process involved review of programming content. Unfortunately, the court did not explain its basis for concluding that, as a matter of law, Los Angeles' franchising process constituted an unconstitutional governmental restriction of speech based on content.¹⁵¹

b. Nondiscriminatory Regulation

If Los Angeles' grant of an exclusive franchise did not pose a risk of viewpoint discrimination, its exclusion of PCI must still satisfy the *O'Brien* test for the reasonableness of its regulations: the exclusion must serve a substantial government interest and be no more restrictive than necessary to serve that interest.¹⁵²

The City of Los Angeles suggested that its exclusion of PCI from the surplus utility pole space was justified because: (1) the installation of cable disrupts the use of city streets,¹⁵³ (2) cable television is similar to broadcast television, which the FCC is permitted to regulate,¹⁵⁴ and (3) cable television tends to be a "natural monopoly."¹⁵⁵ The court rejected the broadcast

149. See *supra* note 127.

150. [T]he means chosen by the City to serve its interests—allowing only the single company selected through the franchise auction process to erect and operate a cable system in each region—creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or the views expressed in, their proposed programs.

Preferred Communications, 754 F.2d at 1406. See also *id.* at 1409. Although a necessary element of the court's analysis—the consideration by Los Angeles of programming content likely to be shown by potential operators—is implicitly contained in the court's characterization of Los Angeles' franchising process, the court did not explicitly find that the franchising process required potential operators to propose programming.

151. The Ninth Circuit did not suggest that the particular procedures used by Los Angeles in selecting an operator placed too much discretion in the hands of public officials. The Cable Act prohibits review of programming content in awarding the franchise. Pub. L. No. 98-549, § 624(f)(1), 98 Stat. 2779, 2790 (to be codified at 47 U.S.C. § 544(f)(1)). See also HOUSE REPORT, *supra* note 31, at 26 ("[T]he Committee does not believe it is appropriate for government officials to dictate the specific programming to be provided over a cable system, and [the Cable Act] reflects this determination."). Therefore, even had Los Angeles reviewed programming content in awarding its franchise, because such review would violate federal law, it would not have been necessary for the court to reach the constitutional question. See *United States v. Security Indus. Bank*, 459 U.S. 70, 78-82 (1982); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

152. See *supra* text accompanying notes 127-29.

153. *Preferred Communications*, 754 F.2d at 1402.

154. *Id.* at 1403.

155. *Id.* at 1403-06. For a discussion of natural monopoly, see *infra* notes 170-71 and accompanying text.

analogy and natural monopoly arguments,¹⁵⁶ and found Los Angeles' interest in regulating the disruption of its streets to be a minimal interest.¹⁵⁷ Although the court's conclusions as to the relevancy of broadcast regulation and the importance of regulation of the disruption of streets were correct, the natural monopoly justification deserves further attention by future courts.

The natural monopoly justification appears most promising of the three justifications for government restriction of access to surplus cable discussed by the Ninth Circuit. Minimizing disruption of city streets, although a valid justification for some regulation of the use of surplus pole space, may not always require the type of exclusive franchise engaged in by Los Angeles. The analogy to the spectrum scarcity doctrine which operates in the broadcast television medium does not justify exclusive franchising as a method of cable television regulation. Whether the cable television market promotes a natural monopoly is a factual question; whether, as a matter of law, a natural monopoly justifies the grant of an exclusive franchise remains to be seen.

i. Public Convenience

The Ninth Circuit determined that the exclusion of PCI was a restriction which was greater than necessary to protect Los Angeles' interest in minimizing the disruption of its streets.¹⁵⁸ This result is consistent with Supreme Court decisions which outline the types of restrictions the government may impose upon speakers in order to safeguard the public's interest in the safe and convenient use of city streets.¹⁵⁹ The government may protect this public interest, but only through reasonable time, place, and manner restrictions on speech which interferes with public use.¹⁶⁰

ii. Physical Scarcity

Los Angeles argued that cable television was similar to broadcast television and its grant of an exclusive franchise was similar to broadcast

156. *Preferred Communications*, 754 F.2d at 1404.

157. *Id.* at 1406-07.

158. *Preferred Communications*, 754 F.2d at 1405-07.

159. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (regulation of the use of the streets for parades is a traditional exercise of government control); *Hague v. CIO*, 307 U.S. 496, 515 (1939), quoted *supra* note 89. In *Hague* the Supreme Court stated that:

The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

160. See *supra* note 159.

franchises granted by the FCC.¹⁶¹ The Ninth Circuit rejected the argument, ruling that broadcasting was distinguishable from cable due to the physical limitations of the broadcast medium.¹⁶² The court found that similar physical limitations did not exist in the cable television medium and that any such limitations were irrelevant based upon PCI's claim that operation of a second cable system was physically possible.¹⁶³

If too many broadcasters use a single radiowave frequency, each drowns out the other or interferes so that none can be heard. The physical scarcity of the broadcast frequencies within the broadcast spectrum used to transmit television signals justifies government exclusive franchising of those frequencies in order to preserve the usefulness of the medium.¹⁶⁴ However, even if many cable operators use one utility pole, no such total interference occurs. Therefore, the spectrum scarcity rationale for government regulation does not apply.¹⁶⁵

A physical limit of another type does apply, however, since the space available on the city's utility poles may be too limited to satisfy the demand for space by all potential cable operators and other programmers. The government in that case presumably would be able to limit the number of operators who could use the poles to install cable.¹⁶⁶ Los Angeles was precluded from showing that the surplus space on its utility poles was physically scarce enough to justify limiting its use to one cable television system operator.¹⁶⁷

161. *Preferred Communications*, 754 F.2d at 1403.

162. *Id.*

163. *Id.* at 1404.

164. The spectrum scarcity doctrine was introduced in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Courts continue to rely upon it to justify special government regulation of television and radio broadcasters. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). According to the doctrine, because the airwaves necessary for broadcasting are physically limited, speech is inherently unavailable to each speaker wishing to speak in the medium. When more speakers wish to use the medium than the inherent limitation will allow, overcrowding of the airwaves results in no speaker being heard. This natural limitation justifies government regulation. The denial of use of the airwaves is therefore not a denial of free speech. *National Broadcasting Co.*, 319 U.S. at 226-27.

165. Earlier cable television decisions did not distinguish the physical characteristics of cable television from broadcast television when applying the spectrum scarcity doctrine. See, e.g., *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968). However, as the Ninth Circuit noted, *Preferred Communications*, 754 F.2d at 1404 & n.7, more recent opinions have abandoned the use of this doctrine as a justification for government regulation. See, e.g., *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). See also *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1054 n.71 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979) (limiting *Black Hills Video* to its facts); *Century Federal, Inc. v. City of Palo Alto*, 579 F. Supp. 1553, 1563 n.19 (N.D. Cal. 1984).

166. Physical scarcity would not justify regulation unless such scarcity resulted in a shortage of space. The limitations of present utility poles is a factual question which has drawn differing opinions. See *infra* note 167.

167. *Preferred Communications*, 754 F.2d at 1404. Because PCI alleged that adequate space was available, and because the appeal arose on a 12(b)(6) motion, the court was forced to assume that space

iii. *Natural Monopoly*

Several courts have held that the economics of the cable television medium alone may justify government restrictions on the speech of some cable operators in order to make cable television available to a wider audience.¹⁶⁸ Los Angeles claimed that the natural tendency for cable television service in an area to become controlled by one operator justified government selection of the operator which would provide the public with the best cable service.¹⁶⁹

A natural monopoly exists in a market if there is a natural tendency for one competitor to emerge with control of the entire market.¹⁷⁰ The question of whether a natural monopoly exists in a particular cable television market is a question of fact.¹⁷¹ The Ninth Circuit did not reach this question since it

was available. *Id.* See *supra* note 118.

As a factual matter, it may be that utility poles in at least some areas cannot accommodate more than one television cable without substantial rearrangement of existing cables or replacement of the pole. See Miller & Beals, *supra* note 9, at 99 & n.60 (citing Pole Attachments, 72 F.C.C.2d 59, 71 (1979)); Mininberg, *supra* note 31, at 557 n.21. But see Stanzler, *supra* note 4, at 223 & n.147 (citing *In re* Cable Television Pole Attachments, 77 F.C.C.2d 187, 191 (1980), for the proposition that surplus space exists as a general rule).

The Ninth Circuit ruled that whether the utility poles in Los Angeles might have an undefined limitation was irrelevant because PCI sought to use space which was as yet unallocated. *Preferred Communications*, 754 F.2d at 1404. It was therefore proper for the court to decline to consider whether Los Angeles might have reasonably regulated the last available cable space. This issue may confront future courts once all utility pole space has been filled.

Were cable operators to fill all available space on a city's utility poles, any further demand for space would probably justify allocation of pole space based on a theory of "pole scarcity" analogous to spectrum scarcity, discussed *supra* note 164.

168. See, e.g., *Community Communications Co. v. City of Boulder (Boulder II)*, 660 F.2d 1370, 1378-80 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 899-900 (W.D. Mo. 1985); *Berkshire Cablevision, Inc. v. Burke*, 571 F. Supp. 976, 986 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

169. *Preferred Communications*, 754 F.2d at 1403-06.

170. "A natural monopoly exists when there are economies of scale so persistent that a single firm can serve a market at a lower unit cost than two or more firms." Nadel, *COMCAR: A Marketplace Cable Television Franchise Structure*, 20 HARV. J. ON LEGIS. 541, 541 n.1 (1983). See generally, Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969); Noam, *Local Distribution Monopolies in Cable Television and Telephone Service: The Scope for Competition*, in TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 351, 355-59 (E. Noam ed. 1983).

171. Cable television systems can cost as much as \$100,000 per mile to install in parts of heavily populated urban areas. Meyerson, *supra* note 31, at 5. The fixed costs of equipment and facilities are shared by all system subscribers and the marginal cost necessary to add a subscriber to cable already running past the subscriber's home is relatively small. *Id.* at 5-6. The large capital investment necessary for system construction, the relatively small revenues received from subscribers, and the nonessential nature of the cable television service combine to deter competition within a fixed market. Stanzler, *supra* note 4, at 200; see also *Inquiry into the Economic Relationship Between Television*, 71 F.C.C.2d 632, 666-72 (1979). Miller and Beals suggest that competition is unlikely in the typical market because subscriptions typically exceed the operator's breakeven point by only ten percent of potential subscribers available in the market. This excess will not support a second system. Miller & Beals, *supra* note 9, at 95; *Cable Economic Inquiry*, 79 F.C.C.2d 663, 686 (1980)). See generally

accepted as true PCI's allegation that it could in fact compete with other operators for cable subscribers in the South Central District.¹⁷² However, in dicta, the court suggested that, even as a matter of law, a natural monopoly in the cable market did not justify government regulation.¹⁷³

Two courts which have considered whether, as a matter of law, cable's status as a natural monopoly justifies government regulation of the medium have reached a different conclusion. The Ninth Circuit rejected both analyses. In *Community Communications Co. v. City of Boulder*,¹⁷⁴ the Tenth Circuit found that the natural monopoly characteristics of cable television, when combined with the disruption of public resources necessary for cable installation, justified government limitation of the number of systems.¹⁷⁵ In its holding, the Tenth Circuit distinguished an earlier holding by the Supreme Court that a natural monopoly by a newspaper in a local market did not justify government regulation.¹⁷⁶ The Tenth Circuit's major distinction between natural monopolies in the two media was not a distinction based upon the first amendment or economics, but rather the observation that cable systems burden a city's resources more than newspapers.¹⁷⁷ However, the Tenth Circuit did not suggest that this burden was a product of cable's natural monopoly characteristic. If the burden is not a product of cable's monopoly status, then the burden does not demonstrate that a cable natural monopoly is distinguishable from a newspaper's natural monopoly and is therefore irrelevant. Thus, the Ninth Circuit correctly rejected the Tenth Circuit's distinction of the significance of monopoly power in the cable television and newspaper media.¹⁷⁸

The Ninth Circuit was more impressed with the Rhode Island district court's justification for finding that cable television's natural monopoly was different from that found in the press. In *Berkshire Cablevision v. Burke*¹⁷⁹ the Rhode Island court found that even in the face of natural monopolization of the newspaper market by one newspaper, small-scale participation

Nadel, *supra* note 170, at 541 n.1 and studies cited therein. But see Lee, *supra* note 31, at 880-88.

172. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1404 (9th Cir. 1985).

173. *Id.* at 1404-05.

174. 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). This case is referred to as "*Boulder II*" to distinguish it from an antitrust suit involving the same parties. See *supra* note 53.

175. *Boulder II*, 660 F.2d at 1378-79.

176. *Id.* In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court held that a state-imposed public right of access to a newspaper's pages violated the the first amendment rights of the newspaper publisher.

177. *Boulder II*, 660 F.2d at 1379. The Tenth Circuit remanded the case to the district court to develop the record regarding the existence of "unique attributes" in Boulder's cable television market (i.e., natural monopoly conditions) which would warrant government regulation of the medium.

178. Preferred Communications, 754 F.2d at 1405 & n.8.

179. 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985). In *Berkshire*, a cable television company that applied for a permit to operate a system in Newport County, Rhode Island challenged the state's power to require cable operators to provide channels for public use.

in the print medium was still possible through, for example, leafletting or publication of a small newsletter.¹⁸⁰ The Ninth Circuit nonetheless also rejected the Rhode Island distinction, noting that broadcast stations had proliferated following the regulation of broadcast television, and speculating that it was possible that the regulation of broadcasting might be relaxed in the future.¹⁸¹ This response, however, did not adequately address the Rhode Island distinction.

The Rhode Island court asserted that a cable television monopoly prevents participation in the medium on a small scale. The proliferation of broadcast stations noted by the Ninth Circuit is not evidence of effective small-scale competition with broadcast television, but is evidence of competition between equal market participants. The Ninth Circuit's speculation that broadcasting regulations may be relaxed in the future appears to refer to relaxation of political "right to reply" regulations.¹⁸² These regulations may presently inhibit public response to broadcast political editorials. Even if this relaxation were likely, the right to reply to broadcast political editorials is not a guaranteed right of access to the broadcast medium whereas leafletting is a guaranteed right of access in the print medium.¹⁸³ Thus the Rhode Island distinction between the exclusionary effect of monopoly in the two media remains essentially unanswered by the Ninth

180. Any person may distribute a written message in the form of a leaflet, pamphlet, or other relatively inexpensive form of "publication." In contrast, a resident of Newport County who does not have seven million dollars to develop his own cable system is shut out of that medium with no way to express his ideas with the widely acknowledged power of the small screen.

Id. at 986. The district court also found that newspapers benefitted from an historical freedom of government control which cable did not enjoy. *Id.* at 985. The court concluded that Rhode Island's public access requirements did not violate the first amendment rights of potential cable operators. *Id.* at 987-88. See *infra* note 181.

181. *Preferred Communications*, 754 F.2d at 1405 n.8 (citing *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983)).

182. In *Loveday*, the D.C. Circuit stated that it was "unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand." *Loveday*, 707 F.2d at 1459. The court also stated that "[a]s matters now stand, the protections accorded printed messages are not wholly irrelevant to broadcast freedoms." *Id.* The court did not support its speculation or explain the relevancy of protections given to the print media, but did suggest that government regulations requiring broadcasters to identify the source of editorial replies might place such a burden upon free speech so as to be "problematic." *Id.* These comments do not suggest that the public right to access to the broadcast media will be significantly expanded. See *infra* note 183. In fact, the D.C. Circuit characterized its comments as "observations . . . mentioned not to raise constitutional doubts but to discern legislative intent . . ." *Id.*

183. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court upheld FCC "fairness doctrine" requirements that broadcasters allow persons attacked in editorials and politicians opposed in political editorials a right to reply via the broadcaster's facilities free of charge. However, the Court later held, in *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), that broadcasters have no duty to accept editorial advertisements. Thus, the right of access to the broadcast medium is dependent upon a prior attack or challenge against the seeker of access. Absent such a triggering event, no right of access exists.

Circuit.¹⁸⁴ The distinction between the effect of natural monopoly power in the newspaper and cable television media, combined with the Supreme Court's instruction that each medium must be considered in light of its unique characteristics, might make natural monopoly a legitimate justification for government restriction on cable development.¹⁸⁵

IV. A PROPOSED SOLUTION

The government may be justified in allowing only one cable operator to operate in a given area due to cable television's tendency to become a monopoly, but the government is probably not justified in allowing the operator who is given the franchise to make exclusive use of its cable system. Since the exclusive operator has no protected interest preventing others from using the forum to speak, the government might require the exclusive operator to install a large system and make all unused channel space available for lease.¹⁸⁶ In this way the government would satisfy the first amendment interests of potential competitive operators and avoid charges of unconstitutional exclusion, at least until all channels were filled. If adequate access to another's cable were given, the denial of a franchise to the potential operator would not constitute a first amendment restriction and the government restrictions would not be subject to the *O'Brien* test.¹⁸⁷

Once all channels were used, however, the denial of an application to install a second cable would raise the first amendment issue. The government would then have to either arrange to replace the existing cable with a larger cable or allow a second operator to install a second system. This scheme would allow the government to minimize the disruptive impact of cable upon government property. The scheme might also make cable more affordable by making all programming available on one system.¹⁸⁸

184. By dividing the market into segments which contain areas of both potentially high as well as potentially low subscriber rates, a local government can directly influence the profitability of cable television. This in turn may bear directly upon the feasibility of competition within the market segment. Thus, by its demarcation of cable television franchise districts, the government may create a "natural" monopoly which might not exist were the district defined differently. The definition of such a market may, however, be justified in order to avoid "cream skimming." See *supra* text accompanying note 36.

185. See *supra* note 133 and accompanying text.

186. This solution is available to cities which have not yet granted a franchise. Those cities which have already granted a franchise would be forced to obtain an amendment to the franchise agreement or dissolve the agreement if possible. In the event the city could do neither, its only option would be to allow a second franchise. This franchise agreement could be better designed to avoid the necessity of additional grants.

187. See *supra* note 130 and text accompanying notes 139-41.

188. The first amendment rights of viewers who will benefit from an enhancement in the availability of cable might also justify the first amendment costs of restriction upon cable operators. For example, the government has an interest in requiring operators to install cable even in those parts of the franchised area which are not profitable. By doing this the government ensures that all citizens in the

The Cable Communications Policy Act of 1984 threatens the viability of this solution. The Act limits the amount of programmable channel space which a city may require an operator to make available for leased access to a maximum of fifteen percent, depending on the channel capacity of the installed system.¹⁸⁹ If the leased space that the city may require of the

community have an equal chance to benefit from the franchise. *See* Cable Act, Pub. L. No. 98-549, § 612(b)(1), (2), 98 Stat. 2779, 2782-83 (to be codified at 47 U.S.C. § 532(b)(1), (2)). Similarly, the government might also justify limiting the cable forum to one cable system in the interests of saving viewers money and also in making the entire range of programming affordable to the greatest number of people. Although neither Los Angeles nor amici raised this justification, it is consistent with the government's interest in making the media available to all. Not only is this interest unrelated to the suppression of speech, the interest is related to fulfilling the goals of the first amendment.

Competition between cable systems may be possible in the cable market. *See, e.g.,* Stanzler, *supra* note 4, at 201 n.9 and sources cited therein (suggesting increasing evidence that overbuilding is economically feasible in certain markets). It is not certain, however, that such competition would result in *more* programming or in *more diverse* programming. Two system operators might compete with one another for the same basic supply of shows. Competition between system operators, each of whom would be motivated to add programming in order to attract new subscribers, would naturally lead to diversity of programming. However, this same motivation would exist, although perhaps to a lesser degree, for a single system operator. This is because the operator, who is concerned about increasing profits, will often be capable of increasing (and in the absence of any disincentive probably would increase) the number of channels carried to the limit which the market could bear. The single large system would sacrifice program diversity only to the extent that the single system operator, feeling more secure in the noncompetitive market, would be less motivated to seek new subscribers.

Moreover, if the government requires that operators lease all unused space, competition among advertiser-supported programmers, each of whom would seek to make the most of leased channel access, should achieve the same benefits as would competition between two system operators. Competition in a single cable system would achieve less significant benefits only to the extent that the system operator overcharged for the use of the channels. The government should be able to prevent abuse of this type through reasonable leased channel rate requirements as a condition of franchising. Current federal law permits such regulation in noncompetitive markets. *See supra* notes 40-41 and accompanying text.

Not only is it uncertain that the normal advantages of competition will occur in the cable market, but the proliferation of systems may entail significant costs to the consuming public. In a multi-system market, in order for subscribers to have access to all channels available, each must subscribe to all systems. The total cost of subscribing to two or more systems is likely to be more than the cost of subscribing to one system, even if the one system has a larger channel capacity. This is due to the relatively large fixed costs incurred during the installation of cable. *See supra* note 171.

If the public is forced to pay more for two systems without a corresponding benefit in terms of increased diversity of programming, not only is there economic waste, but cost may unnecessarily prevent some subscribers or potential subscribers from having access to all programming available in the market. Although it could be argued that each of two cable systems might offer material which appealed to a different audience (and therefore each subscriber might pay less for the fewer shows received and would thus not be forced to subsidize the unwatched channels of the other system), such a model violates the presumption that *each* system operator will attempt to gain a larger group of subscribers by transmitting a diversity of programming.

189. Cable Communications Policy Act of 1984, § 612(b), 98 Stat. 2779, 2782-83 (to be codified at 47 U.S.C. § 532(b)). The Act does not require that any channels be leased on systems with 35 or fewer channels. *Id.* Systems using between 36 and 54 channels must make available for lease 10% of channels not already set aside by federal law for must-carry signals and certain other uses. *Id.* Operators using between 55 and 100 channels must make available for lease 15% of channels not already set aside by federal law. *Id.* Finally, systems with more than 100 channels must make available for lease 15% of

operator under federal law is insufficient to satisfy the first amendment needs of potential competitive system operators, the city's exclusive franchise will deny potential operators sufficient access to the cable medium. This result is unacceptable according to the public forum analysis, and may therefore be unconstitutional.¹⁹⁰ As a result, amendments to the Cable Communications Policy Act are needed to give states and local governments the power to require that all unused channel space be commercially leased, thereby giving government franchising bodies the flexibility to design an efficient and manageable cable service which respects first amendment values.

V. CONCLUSION

Even though the Ninth Circuit misapplied the Supreme Court's public forum analysis, the Ninth Circuit was correct in concluding first, that Los Angeles' surplus pole space represented a public forum by designation, and second, that Los Angeles did not adequately justify limiting the use of its surplus utility pole space to only one potential cable system operator. The Ninth Circuit considered only one of Los Angeles' justifications for its exclusive franchise auction: Los Angeles' interest in preventing the disruption of city streets. The court did not reach other justifications which included the monopolistic nature of the cable medium and the scarcity of pole space. Each may provide support for the government position in future cases. Thus, while the court spoke in broad language, its resolution of the conflict presented is limited to a determination that a potential cable operator has at least enough of a first amendment interest in operating a cable system to prevent a local government from restricting its construction of the system solely on the basis of the government's interest in minimizing disruption of the public streets. Therefore the court's assumptions concerning the breadth of first amendment speech protections due the potential cable operator should not be given undue weight.

The *Preferred Communications* decision will present the Supreme Court with its first opportunity to characterize the cable television medium. This characterization will significantly shape the medium's development. In addition, the *Preferred Communications* decision will provide the Supreme Court with another opportunity to consider the proper role of the government in regulating the use of its property for first amendment expression. The *Preferred Communications* decision will also present the Supreme Court with its first opportunity to consider whether the first amendment

all channels without regard to federal use. *Id.* See also HOUSE REPORT, *supra* note 31, at 48-50.

190. See *supra* note 102 and accompanying text.

interests of a potential cable operator are limited to the selection and creation of video programming and also whether these rights are satisfied to the extent that leased channel space on another cable system is made available.

The Supreme Court can justify the conclusion that leased access from an exclusive cable franchisee will satisfy the first amendment rights of other potential operators. The only barrier then faced by government bodies wishing to maximize expression while minimizing the number of cable systems is the limitation imposed by the Cable Communications Policy Act of 1984 upon the number of leased access channels that the government may require the operator to provide. This limitation will prevent the government from granting an exclusive franchise if the leased channel space that the Act allows the government to impose on the established operator is insufficient to satisfy the potential operators' demand for channel space. Congress may wish to amend the Cable Communications Policy Act to give states and local governments the power to require that all unused channel space be commercially leased. This flexibility is consistent with the Act's purpose in providing local participation in the development of cable and may be applied consistently with and in furtherance of the purposes of the first amendment.

Robert G. Mitchell

Author's Note—As this Note was going to press, the United States Supreme Court affirmed the Ninth Circuit's conclusion that the cable operator's first amendment claim should not have been dismissed by the district court. City of Los Angeles v. Preferred Communications, Inc., 54 U.S.L.W. 4542 (U.S. June 3, 1986) (No. 85-390). Justice Rehnquist's opinion for a unanimous Court held that the cable television operator sought to engage in activities which "plainly implicate[d]" first amendment interests. Id. at 4543. The Court observed that cable operators participate in the communication of ideas as do both the relatively unregulated medium of newspapers and the relatively regulated medium of broadcast television. The Court explicitly refused to discuss whether cable television might be more like one than the other of these media, and remanded the case to the district court for further development of the facts concerning the impact of the cable operator's facilities upon the city. This resolution is consistent with the limitation of the Ninth Circuit opinion advocated by this Note. Issues which comprise the bulk of the discussion in both the Ninth Circuit opinion and this Note—definition of the relative interests of the cable television operator, the government and the public—remain to be resolved.